Reference was made to the Chin Fui Kee accounts. The deceased kept two such accounts, namely, "Chin Fui Kee A account" and "Chin Fui Kee B account." Apparently, remittances to deceased's mother in China were recorded in the "Chin Fui Kee A account." However, there was no satisfactory explanation as to the existence of the "Chin Fui Kee B account" albeit some payments to the Chartered Bank appeared in this account. No reliable person was called to explain these two accounts. We would like to know whether the "Chin Fui Kee B account" was a partnership account or that of the deceased. Also, whether the money in the "Chin Fui Kee B account" belonged to the partnership or that of the deceased. Even if the "Chin Fui Kee B account" belonged to the firm there was no clear evidence to show that "the property" was bought with the money belonging to the firm. On the documentary evidence it was clear that the shophouse was constructed with money advanced by the Chartered Bank and some had been repaid from money in the "Chin Fui Kee B account."

In our view, on careful analysis, we are unable to find any clear evidence that the Chartered Bank loan was repaid by money belonging to the partnership. We are unable to support the finding of the learned Judge that "the property" was partnership property and that the appellant held "the property" on constructive trust. Also, we do not consider that on the evidence the respondents have brought their case within the ambit of section 23 of the Partnership Act, 1961. Accordingly, we would allow the appeal with costs here and the court below. The deposit is to be refunded to the appellant. Consequently, we consider that the appellant should be entitled to his claims under paragraph 8 of his statement of claim. The respondents are ordered to vacate the premises one month from the date of the judgment.

We confirm the dismissal of the counterclaim. However, the order to pay the respondents the sum of $4,119.80 arising out of the auction sale which followed the distress for rent proceedings ought to be varied. We order that the sum of $4,119.80 be paid to the appellant towards the payment of arrears of rent as claimed under paragraph 8 of the statement of claim.

*Order accordingly.*

Solicitors: *Jayasuriya Kah & Co.; Chau & Thien.*

## RAMLAN BIN SALLEH v. PUBLIC PROSECUTOR

**[S.C. (Wan Suleiman, Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) February 23 & May 11, 1987]**

**[Kuala Lumpur – Supreme Court Criminal Appeal No. 13 of 1986]**

*Criminal Law and Procedure – Charge of murder – Trial by jury – Duty of judge to put all available defences whether or not relied upon by accused, having regard to the evidence – Defence of grave and sudden provocation put to jury – Defence that accused never intended to kill but merely wanted to frighten the deceased – Possible verdict of firing rifle in a rash or negligent manner not put to jury – Retrial ordered – Penal Code, ss. 302 & 394A.*

*Penal Code, ss. 302 & 394A – Murder – Defence of grave and sudden provocation – Defence that accused never intended to kill but merely wanted to frighten deceased.*

The appellant had been convicted for murder and appealed against his conviction. It was alleged that while on guardroom duty at the entrance to the military camp where he was stationed the appellant shot and killed his superior officer, the deceased. The deceased was the appellant's immediate superior and the alleged motive for the shooting was the cancellation of the appellant's leave as a result of a disciplinary proceeding on a traffic charge lodged by the deceased against him for not wearing a crash helmet when riding a motor cycle. At the trial the learned Judge reminded the jury that to constitute murder the prosecution was not obliged to prove motive as distinct from an intention to kill and he also put to the jury the incident of leave cancellation as a basis for the defence of grave and sudden provocation which would reduce the offence to culpable homicide not amounting to murder. He directed the jury to consider two possible verdicts (a) guilty of murder; (b) guilty of culpable homicide not amounting to murder.

On appeal it was argued that the judge had failed to put to the jury a third alternative verdict arising from the appellant's defence, namely, guilty of an offence under section 304A of the Penal Code for causing death by a rash or negligent act. In his summing up the learned judge had referred to the defence that the accused had never intended to kill or even to wound the deceased and that he merely wanted to frighten him. However the possible verdict under section 304A was not put to the jury.

**Held:** it was the duty of the judge to put to the jury the defence that the shooting was merely to frighten the deceased as a third alternative verdict and it was for the jury to accept or reject the defence. The conviction must therefore be quashed and a retrial ordered.

*Case referred to:*

(1) *Loo Geok Hong* v. *Public Prosecutor* [1961] M.L.J. 157.

SUPREME COURT.

*G. Naughton Christie* for the appellant.
*Ng Aik Guan* (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

**Mohamed Azmi S.C.J.** (delivering the Judgment of the Court): On March 16, 1986, the appellant was convicted for murder in contravention of section 302 of the Penal Code. He appealed against his conviction and on February 23, 1987, we set aside his conviction and ordered a retrial before another Judge and jury. We now state our reasons for quashing the conviction.

The charge against the appellant was framed as follows:

"That you on the 25th day of July, 1983 at about 3.30 p.m. in front of Quarters Guard 4th Royal Cavalry Regiment, Lapangan Terbang Camp, Sungai Petani, in the district of Kuala Muda, in the State of Kedah, did commit murder by causing the death of one Annuar bin Abd. Hamid, and that you have thereby committed an offence punishable under section 302 of the Penal Code."

At the relevant time, the appellant was a member of the 4th Royal Cavalry Regiment stationed at Lapangan Terbang Camp, Sungai Petani. It was the case for the prosecution that on the date and time as stated in the charge, the appellant was on guardroom duty at the entrance to the military camp when he shot and killed the deceased with an M.16 rifle. Altogether about eight shots in two sequence were fired in rapid succession whilst the deceased was entering the camp on a motorcycle as a pillion rider, and one of the three shots which hit him proved to be fatal. The deceased, Sergeant Annuar bin Abd. Hamid, was the appellant's immediate superior officer, and the alleged motive for the shooting was the cancellation of the appellant's six-day leave, as a result of a disciplinary proceeding on a traffic charge lodged by the deceased against him for not wearing a crash helmet when riding a motorcycle. There was evidence that the appellant had been selected to represent his Regiment in rugby, and the purpose of the six-day leave was to enable him to report at the rugby training centre in Ipoh. The deceased had earlier on refused the application for leave on the ground that the appellant had recently taken leave, but the appellant managed to get his leave approved by other officers. It would appear that it was then that the deceased brought the traffic violation charge against him which resulted in the cancellation of the leave. The appellant was informed of the cancellation at about 2 p.m. and the shooting occurred about one and a half hours later. The learned trial Judge rightly reminded the jury that to constitute murder the prosecution was not obliged to prove motive as distinct from intention to kill, and he also quite properly put to the jury the incident of leave cancellation as a basis for the defence of grave and sudden provocation which would reduce the offence to culpable homicide not amounting to murder. The learned Judge, at the end of his 50-page summing-up, directed the jury to consider two possible verdicts:

(i) Guilty of murder;
(ii) Guilty of culpable homicide not amounting to murder.

It is reasonable to assume that the jury had considered the defence of provocation and had rejected it, and that they were left with only one other verdict *i.e.* either guilty or not guilty of murder.

Before us Mr. Christie for the appellant had no reservation in commending the learned trial Judge in the way he had so fairly and painstakingly directed the jury on the law of murder and culpable homicide not amounting to murder, particularly on the defence of provocation. His sole complaint was that the learned trial Judge had omitted completely to put to the jury a third alternative verdict arising from the appellant's defence, namely, guilty of an offence under section 304A of the Penal Code for causing death by rash or negligent act. In our view, there was merit in Mr. Christie's complaint having regard to the evidence although section 304A had not been specifically raised by him in his submission to the jury. In evidence, the appellant had testified that he was upset when he was informed about the cancellation of his leave, and he was still upset when he went on duty at the guardroom. He was angry with the deceased for being instrumental in the cancellation of his leave. He became even more angry and provoked when he saw the deceased approaching the camp on a motor-cycle. He fired several shots towards the moving motor-cycle at different directions "just to frighten him." He had no thought of killing the deceased, and that was why he put the M.16 rifle at semi-automatic position because it would be dangerous if he had selected the automatic position. He never intended his shots to hit the deceased. To be fair to the learned trial Judge he did in fact at page 30 of his summing-up draw the jury's attention to the fact that the defence was a complete denial of having any of the inten-

tion specified in section 300 as constituting the offence of murder. In fact at page 37 of his summing-up, the learned Judge would appear to have appreciated the defence's position although he did not elaborate on it as much as he did on the defence of provocation. The crux of the defence "of intention to frighten and not to kill" was merely put to the jury in the following manner:

"The main thrust of the defence of the accused is that at the time of the shooting he had never intended to kill or even to wound the deceased. He merely wanted to frighten the deceased. He was at that time very angry and could not control himself. In fact he was in a confused state."

In jury trial, the first duty of the Judge in dealing with the defence case is to put to the jury the defence put up by the accused even if such defence appears to him to be too far-fetched and ought to be rejected. Such defence may constitute a lesser offence than murder, or it may even be lesser than culpable homicide not amounting to murder. The trial Judge is of course at liberty to comment on the evidence and in rare and appropriate cases may even make unfavourable remarks on the defence put up by the accused provided he makes it very clear to the jury that they are not bound by his view and opinion on issues of fact. His next duty is to put to the jury all available defences whether or not relied upon by the accused, having regard to the evidence. But as was held by the Court of Appeal in *Loo Geok Hong* v. *Public Prosecutor*,[1] the way in which the jury is to be directed on available defences is a matter for the trial Judge having regard to the evidence with which he is concerned. What is important is the effect and not the form of the direction.

Having regard to the evidence, we were of the view that it was inadequate for the learned Judge merely to refer to the jury to the defence story of his intention "merely to frighten the deceased" as only relevant to negative the intention to kill, but he should have gone one step further by leaving it to the jury to consider a possible third verdict of guilty under section 304A of the Penal Code for firing the M.16 rifle in a rash or negligent manner even if they were to conclude that the shooting was "merely to frighten the deceased." Although the learned Judge did briefly refer to such defence, it was his duty in this particular case to put it to the jury as a third alternative verdict, and it was for the jury to accept or reject the defence. The failure to do so was fatal in the circumstances. In this particular instance, the importance of putting the defence story for two distinct purposes assumed particular importance in view of the thorough manner in which the learned trial Judge had dealt with the defence of provocation. So much so, it was more than likely that any reasonable jury would have thought that the defence put up by the appellant was merely the defence of provocation and not also one of shooting in the direction of a moving motor-cycle on which the deceased was a pillion rider, for the purpose of frightening him. It was unfortunate that in this particular case the thoroughness of the trial Judge's direction to the jury on the alternative verdict of culpable homicide not amounting to murder on ground of provocation, which in itself was not wrong in law, had the effect of obliterating or diluting the brief direction on the defence of "merely to frighten the deceased." The two alternative verdicts had the effect of restricting the jury to consider the defence's story only as regard intention to kill but not as a possible defence of reducing the offence to one under section 304A. In the light of the evidence before him, the learned Judge should, having recognised the main thrust of the defence, put to the jury the verdict they should return not only in the event that they rejected the defence's story "to frighten the deceased," but also in the event of them accepting such defence. If only the third alternative verdict under section 304A had been put to the jury, the summing-up of the learned Judge would have been beyond criticism.

For reasons we have stated, we quashed the conviction and ordered a retrial.

*Conviction quashed and retrial ordered*

Solicitor: *G.N. Christie & Co.*

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## SUN PROPERTIES SDN. BHD. & ORS. v. HAPPY SHOPPING PLAZA SDN. BHD.

**[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) April 1 & June 8, 1987]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 141 of 1986]**

*Contract – Sale of shares in company – Payment of deposit – Forfeiture of deposit – Contracts Act, 1950, s. 75.*

The respondent entered into a sale agreement with the appellants to purchase from the appellants all the shares in a company for the price of $10 million. The sum of $1 million was paid as deposit and towards account of the purchase